

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	CC Docket No. 01-92
Petition of Vaya Telecom, Inc. For Declaratory)	
Ruling Regarding LEC-to-LEC VoIP Traffic)	
Exchanges)	
)	
Developing an Unified Inter-carrier)	
Compensation Regime)	

COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES

Pursuant to Public Notice, DA 11-1561, released September 20, 2011 (the “*Public Notice*”) issued by the Federal Communications Commission (“Commission”), the Nebraska Rural Independent Companies (“Nebraska Companies”)¹ hereby submit these Comments in response to the Petition of Vaya Telecom, Inc. for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges (the “*Vaya Petition*”). As noted by the Commission,

Vaya seeks a declaration that, “a LEC’s attempt to collect intrastate access charges on LEC-to-LEC VoIP traffic exchanges is an unlawful practice.” Vaya asserts that “[c]onsistent with the Commission’s treatment of ISP [Internet service provider]-bound traffic, this LEC-to-LEC, jurisdictionally interstate traffic exchange is subject to section 251(b) of the Telecommunications Act, and not the separate intrastate access charge regimes of the states.”²

¹ The Companies submitting these Comments are: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Co., K. & M. Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telecom Inc., and Three River Telco. Each of the Nebraska Companies is a Local Exchange Carrier (“LEC”) that operates within the State of Nebraska. Moreover, each of the Nebraska Companies is an interested party in this proceeding since the relief that Vaya Telecom, Inc. (“Vaya”) seeks through the *Vaya Petition* could affect the inter-carrier compensation that each of the Nebraska Companies assess to other providers where allegations are made that the traffic is Voice over Internet Protocol (“VoIP”) traffic.

² *Public Notice* at 1 quoting *Vaya Petition* at 1.

For the reasons stated herein, these and other contentions made by Vaya are without support, legal basis and/or are in conflict with existing Commission precedent.

Accordingly, the Commission should reject the *Vaya Petition* and, when addressing the very same issues in its on-going proceeding regarding *both* intercarrier compensation (“ICC”) and federal universal service, eliminate, once and for all, these types of petitions that seek to avoid payment of proper ICC for the use of the terminating networks that constitute the Public Switched Telephone Network (“PSTN”).

I. THE COMMISSION IS CORRECT THAT MANY OF THE ISSUES RAISED IN THE VAYA PETITION ARE ALREADY FULLY ADDRESSED IN THE PENDING PROCEEDING ADDRESSING ICC AND FEDERAL UNIVERSAL SERVICE FUND ISSUES.

As an initial matter, the Nebraska Companies agree with the Commission that the underlying presumption made in the *Vaya Petition* – that interconnected VoIP traffic is “jurisdictionally interstate” and thus “intrastate access charges” are inapplicable to such traffic³ – is a contention “that the Commission is already considering in CC Docket No. 01-92. . . .”⁴ In fact, the Commission has specifically raised these types of issues in the *CAF NPRM*, of which CC Docket No. 01-92 is a component,⁵ and the underlying jurisdictional issues that are raised by

³ *Vaya Petition* at 1.

⁴ *Public Notice* at 1.

⁵ See *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WC Docket No. 10-90, FCC 11-13, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, released February 9, 2011 (“*CAF NPRM*”) at paras. 608-619. The Nebraska Companies note that these paragraphs of the *CAF NPRM* are part of Section XV of that document and that comments were filed on an expedited basis regarding these issues as compared to other matters raised in the same document. See, e.g., *CAF NPRM*, Title Page.

the *Vaya Petition* are also currently being addressed as part of the Commission's review of the so-called "ABC Plan" and "RLEC Plan."⁶

The record addressing these issues in the context of the *CAF NPRM* and the *Further Notice* amply demonstrates that Vaya's working (yet erroneous) assumption that *all* VoIP traffic is jurisdictionally interstate is wholly without basis, both legally and factually.⁷ The Commission should therefore reject the notion that the traffic being addressed in the *Vaya Petition* is wholly interstate in nature (presumably due to the use of Internet Protocol ("IP") transport for traffic ultimately terminated on the PSTN), and the notion that such traffic is subject *only* to the reciprocal compensation regime under 47 U.S.C. § 251(b)(5).⁸ Rather, the Commission should apply the very same ICC regimes to interconnected VoIP traffic that are applicable to other traffic exchanged over the PSTN. Accordingly, the *Vaya Petition* should be

⁶ See, Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, Public Notice, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, DA 11-1348, released August 3, 2011 (the "*Further Inquiry*").

⁷ Consistent with the Commission's conclusion that reply comments are not necessary due to the already-pending issues that are raised in the *Vaya Petition*, the Nebraska Companies also do not believe that the record in response to the *Public Notice* should be burdened with a reiteration of the full panoply of submissions that they have made demonstrating the proper resolution of the ICC treatment of VoIP traffic. Thus, the Nebraska Companies incorporate herein by reference the following comments that are already have been filed with the Commission in response to either the *CAF NPRM* or the *Further Notice*, including other parties' comments as referenced therein: Section XV Comments of the Nebraska Rural Independent Companies, WC Docket No. 10-90, *et al.*, filed April 1, 2011 at 2-20; Section XV Reply Comments of the Nebraska Companies, WC Docket No. 10-90 *et al.*, filed April 18, 2011 ("Nebraska Section XV Replies") at 1-15; Comments of the Nebraska Rural Independent Companies, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 34-38; Reply Comments of the Nebraska Rural Independent Companies, WC Docket No. 10-90, *et al.*, filed May 23, 2011 at 9-10, 33-39; Comments of the Nebraska Rural Independent Companies in Response to August 3, 2011 Further Inquiry, WC Docket No. 10-90, *et al.*, filed August 24, 2011 at 13-37, 41-42; and Reply Comments of the Nebraska Rural Independent Companies in Response to August 3, 2011 Further Inquiry, WC Docket No. 10-90, *et al.*, filed September 6, 2011 at 31-36.

⁸ See, e.g., *Vaya Petition* at 1, 7.

dismissed as a part of the Commission's disposition of the *CAF NPRM* and the *Further Inquiry* proceedings.

II. THE VAYA PETITION PROVIDES NO FACTUAL BASIS THAT WOULD ALLOW A REASONED DECISION TO BE MADE, AND IS ALSO INCONSISTENT WITH EXISTING COMMISSION PRECEDENT.

Separate and apart from the erroneous legal contentions regarding the jurisdictional nature of VoIP, the *Vaya Petition* also raises a distinct set of factual issues that require the relief Vaya seeks to be rejected outright. And, even assuming further analysis of the *Vaya Petition* is required, Vaya's contentions should be rejected based on Commission precedent that has already resolved the true underlying issues applicable to the *Vaya Petition*.

A. Vaya's Assertions Provide no Factual Basis for Reasoned Decision Making.

The Nebraska Companies respectfully submit that the *Vaya Petition* should be rejected based on the lack of facts to support its contentions as demonstrated by the internally inconsistent method by which the requested relief is stated. For example, Vaya first states that it "receives IP-based traffic from a wide variety of companies in IP-format (including nomadic and fixed VoIP service providers) over the Internet"⁹ and then states that "Vaya only sends traffic to the PSTN that originates on IP-enabled devices."¹⁰ These assertions are not supported by any factual demonstration made by Vaya or by its customers, and thus both the Commission and interested parties are not able to test these assertions to determine their accuracy.

By way of further example, Vaya states that it is seeking a "declaration confirming that it is not required to pay a LEC's intrastate tariffed access charges when Vaya receives a call that

⁹ *Id.* at 2.

¹⁰ *Id.* The *Vaya Petition* is silent with respect to the meaning of an "IP-enabled" device or how the terms should be defined since no reference is made to the Commission's existing rules. See 47 C.F.R. §9.3 (Definition of "interconnected VoIP service"). Thus, the Commission, like the Nebraska Companies, is left guessing as to what is being described and the ramifications of a decision based on this unexplained assertion.

begins on the Internet and delivers that call to another LEC for termination.”¹¹ Of course, interconnected VoIP does not “begin on the Internet” but rather begins on some form of connection, more than likely a connection that is part of the PSTN such as, but not limited to, a broadband interconnection facility. For this reason alone, the *Vaya Petition* should be dismissed because it makes an assertion that lacks a proper factual basis.

To be sure, therefore, the relief requested by Vaya is entirely unclear since the request is inconsistent with the facts. And, it is equally uncertain and unclear what demonstrated facts Vaya has presented that can be tested by the Commission and interested parties to determine their accuracy. Without these facts, the only rational decision that can be made is that the *Vaya Petition* should be rejected since it is impossible for the Commission to place in proper context the issue that is presented and the ramifications of the decision that Vaya seeks. In its best light, the *Vaya Petition* may be seeking an advisory opinion from the Commission, a result contrary to the proper purpose for a declaratory ruling. Accordingly, based on Vaya’s lack of explanation and demonstrated facts, the Nebraska Companies respectfully submit that the Commission should reject the *Vaya Petition*.

B. The *Vaya Petition* should be Dismissed Based on Existing Precedent.

Even if any additional analysis of the *Vaya Petition* is required and taking the factual assertions contained therein as true for sake of argument, the request being made by Vaya should be rejected based on already-existing Commission precedent. Vaya describes the IP-PSTN terminating services that it provides to its customers that it refers to as its “clients.”¹² In doing so, Vaya describes a contractual arrangement that it has sold to its clients by which its clients can, through Vaya, terminate their traffic over the PSTN. At the same time, because Vaya

¹¹ *Id.* at 3.

¹² *See id.* at 2.

claims that the subject matter of the *Vaya Petition* implicates “LEC-to-LEC traffic exchanges that originate on the Internet,”¹³ it must be logically assumed that Vaya is a LEC (again a missing fact in the *Vaya Petition*), and thus a telecommunications carrier/common carrier.¹⁴

Based on these assertions, Vaya has effectively stated that it is a wholesale telecommunications carrier providing a PSTN-based terminating service. Accordingly, Vaya has not and cannot demonstrate that it falls outside of the Commission’s ruling in the *Time Warner Order*.¹⁵ Therein the Commission has already determined as a matter of law that a wholesale telecommunications carrier (a class of carrier which amply fits Vaya’s description of its service offering to its clients) is responsible for the intercarrier compensation associated with intrastate access traffic delivered to the PSTN for termination.

In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein.⁵³ We do not, however, prejudge the Commission’s determination of what compensation is appropriate, or any other issue pending in the *Inter-carrier Compensation* docket.

⁵³ See, e.g., Verizon Comments at 2 (stating that one of the wholesale services it

¹³ *Id.* at 7.

¹⁴ Absent such conclusion, it is uncertain how Section 251(b)(5) would apply since this obligation applies to another LEC. See 47 C.F.R. § 51.703(a) (“Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.”). And, as existing precedents indicate, a “telecommunications carrier” and “common carrier” are synonymous. See *Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921, 926-927 (D.C. Cir. 1999) (The term “telecommunications carrier” means “common carrier.”); *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) *cert denied*, 425 U.S. 992.

¹⁵ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, Memorandum Opinion and Order*, WC Docket No. 06-55, 22 FCC Rcd 3513 (2007) (“*Time Warner Order*”).

provides to Time Warner Cable is “administration, payment, and collection of intercarrier compensation”); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers “intercarrier compensation, *including exchange access and reciprocal compensation*”).¹⁶

In doing so, the Commission did not limit compensation to a Section 251(b)(5) reciprocal compensation arrangement as Vaya contends,¹⁷ even though the Commission was fully aware that it was addressing wholesale telecommunications carriers that served entities offering interconnected VoIP services.¹⁸ Thus, contrary to Vaya’s contentions, the Commission has already acknowledged in footnote 53 of the *Time Warner Order* that the appropriate ICC regimes applicable to wholesale telecommunications carriers include *both* reciprocal compensation and exchange access charges since each is part of a “Section 251 arrangement.”¹⁹ And, “exchange access” is a Section 251 arrangement as reflected in Section 251(g) of the Act²⁰ with intrastate access specifically preserved under Section 251 pursuant to Section 251(d)(3).²¹ Moreover,

¹⁶*Id.* at para. 17 & n.53 (emphasis added).

¹⁷ See *Vaya Petition* at 7-8.

¹⁸ See *Time Warner Order* at para. 1, 13, 15.

¹⁹ See *id.* at para. 17.

²⁰ See 47 U.S.C. §251(g).

²¹ See 47 U.S.C. § 251(d)(3). The Nebraska Companies fully recognize that the proper application of ICC requires the identification of the beginning and end points of the call and that the Commission has already acknowledged that carriers can continue to be determined by the industry based on the “to” and “from” numbers, Common Channel Signaling System No. 7 information or properly developed factors. See, *In the Matter of the Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, *Declaratory Ruling and Report and Order*, FCC 06-79 (rel. June 30, 2006) at para. 32 & n.89 and 90 citing *In the Matter of Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, CC Docket No. 01-92, 20 F.C.C.R. 4685 (2005) (the “*Intercarrier Compensation FNPRM*”); see also *Intercarrier Compensation FNPRM* at para. 22 & n.59. (“Telecommunications carriers typically compare the telephone numbers of the calling and called party to determine the geographic end points of a call, which may be relevant for jurisdiction and compensation purposes.”) (citing *Starpower Communications, LLC v. Verizon South Inc.*, EB-00-MD-19, *Memorandum Opinion and Order*, 18 F.C.C.R. 23625, 23633, para. 17 (2003)); see also, Nebraska Section XV Replies at 8. Yet, Vaya provides no facts that reveal the method by which it assigns numbers to the traffic it terminates on the PSTN. Rather, Vaya simply states that it “must populate the signaling information with a calling party’s number before routing the call to the appropriate carrier for

since the record in the *CAF NPRM* and the *Further Inquiry* demonstrates no basis for preempting state exchange access policies and regimes, Vaya cannot sustain its claims based on the Commission's reference within the *Time Warner Order* to future ICC-related decisions.

Accordingly, Vaya cannot sustain the underlying premise upon which the *Vaya Petition* is based – that it can evade its separate common carrier status and the attendant ICC obligations based on a lack of Commission classification of VoIP traffic as a telecommunications service in order to eliminate Vaya's obligations to pay intrastate access charges. It is the terminating offering by Vaya, and not the use of that offering by the clients of Vaya, that governs Vaya's ICC obligations.²²

Since Vaya sold its “PSTN terminating” common carrier service to its clients, Vaya, as a common carrier/telecommunications carrier, must pay the appropriate ICC rate arising from Vaya's use of the PSTN. Thus, Vaya cannot possibly escape its payment of proper ICC (including intrastate access charges) when it offers its common carrier service to its clients, a conclusion fully consistent with the *Time Warner Order*.

III. VAYA'S EFFORTS TO RELY ON THE COMMISSION'S INTERNET SERVICE PROVIDER-BOUND DECISIONS TO SUPPORT THE RELIEF IT REQUESTS SHOULD ALSO BE REJECTED.

Finally, Vaya attempts to “boot strap” the Commission's treatment of dial up Internet Service Provider (“ISP”)-bound traffic by suggesting that the “Internet traffic Vaya receives

termination to that carrier's customer (*i.e.*, the called party).” *Vaya Petition* at 4. Accordingly, in rejecting the *Vaya Petition*, the Nebraska Companies also request that the Commission provide guidance on number assignments in these types of cases in order to ensure proper ICC application.

²² See *Time Warner Order* at para. 15 (“[W]e clarify that the statutory classification of a third-party provider's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b).”)

from its VoIP-service-provider customers and exchanges with other LECs is simply ISP-bound traffic flowing in the other direction.”²³ This contention defies all logic.

Assuming for sake of argument that an ISP is involved in the traffic delivered by Vaya for termination on the PSTN (again an unproven fact), once traffic is delivered to an ISP, the use of the PSTN to deliver that traffic to the ISP ends. However, if that ISP then elects to offer a service that allows the original ISP traffic to then be delivered to the PSTN for termination, a new type of service is established since the “surfing” of the Internet has ended and a new use of the PSTN begins. This new service is offered to the ISP by a wholesale telecommunications carrier (such as Vaya) and the ICC due and owing by that wholesale telecommunications carrier is separate and apart from whatever service the ISP may have sold to its customer. But setting the illogic of the Vaya contention aside, Vaya does not address the fact that the ISP-bound decision that it relies upon addressed “dial-up” to the Internet, a type of service that the Commission indicated was of lessening importance.²⁴ Moreover, by definition, interconnected VoIP does not use a dial-up connection but rather, uses a broadband connection.²⁵ Accordingly, for all of these reasons, the reliance on the ISP-bound traffic decisions that Vaya cites for its position can and should be rejected.

IV. CONCLUSION.

The Nebraska Companies respectfully submit that the Commission should reject the *Vaya Petition*. The *Vaya Petition* appears to skirt Commission precedent and to create arguments based on the contention that the existence of VoIP traffic somehow changes the ICC regimes and

²³ *Vaya Petition* at 9.

²⁴ See Comments of the National Association of Regulatory Utility Commissioners, WC Docket No. 10-90 *et al.*, filed August 24, 2011 at 13 (Reference5 to prior Commission assertions regarding its ISP-bound decisions).

²⁵ 47 C.F.R. §9.3 (Definition of “Interconnected VoIP service”).

the application thereof. No such change has been made (and is not rationally and legally justified on a going-forward basis) and absolutely no legal basis exists to justify Vaya's claim that it need not pay for termination of traffic to PSTN in the manner that requires other common carriers to pay ICC. Accordingly, the Nebraska Companies respectfully request that the Commission reject the declaratory relief that Vaya seeks and, in doing so, provide definitive guidance that, once and for all, forecloses the baseless contentions and assertions upon which the *Vaya Petition* relies.

Dated: October 6, 2011 Respectfully submitted,

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